COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT

[Entered February 19, 2003]

CASE NO. 02-C1-903

ACADEMY OF MEDICINE OF CINCINNATI, *et. al.*

Plaintiffs

v.

AETNA HEALTH, INC., *et. al.*

Defendants

ORDER DENYING DEFENDANTS' MOTIONS TO COMPEL ARBITRATION AND MOTIONS TO DISMISS

This cause came on for hearing before the Court on January 8, 2003, on the following motions:

- Anthem Blue Cross and Blue Shield's Motion to Compel Arbitration, and to Dismiss or Stay Proceedings, Including a Stay of Discovery (Oral Argument Requested);
- Defendant Aetna Health, Inc.'s Motion to Compel Arbitration and to Stay the Action Pending Arbitration and Motion to Stay Discovery (Oral Argument Requested);
- Humana Health Plan of Ohio, Inc.'s Motion to Compel Arbitration, and to Stay Discovery Pending Resolution of the Arbitration Issue and Motion to Dismiss;

- United Healthcare of Ohio, Inc.'s Motion to Compel Arbitration and to Dismiss or Stay Proceedings, Including Discovery (Oral Argument Requested); and
- Defendants' Joint Alternative Motion to Dismiss and to Stay Discovery (Oral Argument Requested).

Collectively, the foregoing motions are referred to herein as "Defendants' Motions."

Having fully considered the memoranda filed by counsel for the parties relating to Defendants' Motions, and the arguments of counsel, this Court FINDS that:

All of the Defendants' Motions are not well taken and are therefore OVERRULED.

A. Defendants' Motions to Compel Arbitration and Motions to Dismiss or Stay Proceedings, Including Discovery.

Plaintiffs Academy of Medicine of Cincinnati, A. Lee Greiner, M.D., Raymond Will, M.D., Victor Schmelzer, M.D., Karl S. Ulicny, Jr., M.D., E. Douglas Baldridge, M.D., P. Scott Becker, M.D. and the Northern Kentucky Medical Society (collectively "Plaintiffs") allege in their Amended Complaint that Defendants Aetna Health, Inc., Humana, Inc., Anthem Blue Cross and Blue Shield, and United HealthCare of Ohio (collectively "Defendants") engaged in a conspiracy of price fixing in violation of K.R.S. §367.175, Kentucky's antitrust statute. This dispute does not arise out of or relate to the contracts between Plaintiffs and Defendants. Rather the lawsuit arises out of Defendants' alleged conspiracy to fix the insurance reimbursement rates paid to physicians in Northern Kentucky. In addition, the parties never agreed to arbitrate claims that were independent of any breach of contract.

In this case, arbitration is a matter of contract. Since Plaintiffs are objecting to compelling this lawsuit to arbitration, the court shall not compel an arbitration for a dispute the parties did not agree, in advance, to arbitrate.

B. Defendants' Joint Alternative Motion to Dismiss and to Stay Discovery.

The association Plaintiffs, Academy of Medicine of Cincinnati and the Northern Kentucky Medical Society satisfy the requirements to have standing as party plaintiffs in the case.

The Amended Complaint properly alleges a claim for violation of K.R.S. §367.175, Kentucky's antitrust statute.

This matter is properly brought and the claims alleged arise not from Defendants' performance of services related to the health insurance provider contracts, but rather from Defendants' alleged anticompetitive conduct, and further, the parties did not agree to arbitrate the claims alleged in the Amended Complaint as provided for by K.R.S. §417.045-.240.

The Court further finds that Plaintiffs have properly pled a private right of action for injunctive relief and punitive damages, if proven at trial, and the court does have the authority to grant the injunctive relief requested by Plaintiffs, without having to engage in setting reimbursement rates.

The Court further finds that Defendants' Motion to Stay Discovery is denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, THAT:

All of Defendants' Motions are overruled.

Pursuant to Kentucky Civil Rule 12.01, Defendants are required to respond to the Amended Complaint within ten (10) days after the date of the entry of this Order.

IT IS SO ORDERED.

2-18-03
Date

/s/
Joseph F. Bamberger, Judge
Boone Circuit Court

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

[Rendered October 29, 2004]

NO. 2003-CA-000752-MR

ANTHEM HEALTH PLANS OF KENTUCKY, INC., d/b/a
ANTHEM BLUE CROSS AND BLUE SHIELD
Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI;
A. LEE GREINER, M.D.; RAYMOND WILL, M.D.;
VICTOR SCHMELZER, M.D.; KARL S. ULICNY, JR.,
M.D.; E. DOUGLAS BALDRIDGE, M.D.;
P. SCOTT BECKER, M.D.; AND NORTHERN
KENTUCKY MEDICAL SOCIETY
Appellees

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00903

AND:

NO. 2003-CA-000753-MR

UNITED HEALTH CARE OF OHIO, INC.
Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI;
A. LEE GREINER, M.D.; RAYMOND WILL, M.D.;
VICTOR SCHMELZER, M.D.; KARL S.ULICNY, JR.,
M.D.; E. DOUGLAS BALDRIDGE, M.D.;
P. SCOTT BECKER, M.D.; AND NORTHERN
KENTUCKY MEDICAL SOCIETY
Appellees

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00903

AND:

NO. 2003-CA-000754-MR

AETNA HEALTH, INC.

Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI; A. LEE GREINER, M.D.; RAYMOND WILL, M.D.; VICTOR SCHMELZER, M.D.; CARL S. ULICNY, JR., M.D.; E. DOUGLAS BALDRIDGE M.D.; P. SCOTT BECKER, M.D.; AND NORTHERN KENTUCKY MEDICAL SOCIETY

Appellees

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 02-CI-00903

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JUDGE; EMBERTON, SENIOR JUDGE[1] AND MILLER, SENIOR JUDGE.[2]

---

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

[2] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

EMBERTON, SENIOR JUDGE. The appellees are physicians and nonprofit medical societies who filed this action against the appellants, Anthem Health Plans of Kentucky, Inc., United Health Care of Ohio, Inc., Aetna Health, Inc., and Humana Health Plans of Ohio, Inc.,[3] alleging that appellants conspired to fix and lower the insurance reimbursement rates paid to hospitals and physicians in violation of Kentucky's antitrust statute, KRS[4] 367.175. The issue presented is whether the antitrust claims fall within the scope of the arbitration clauses in the contracts between the appellants and appellees. We agree with the trial court that the antitrust claims are not subject to arbitration and affirm its refusal to compel arbitration.

Appellants are the primary providers of group health insurance policies in the Northern Kentucky region. Appellees allege that appellants agreed among themselves to set reimbursement rates paid to doctors and hospitals below the reasonable cost of those services. There can be no dispute that the provider contracts contain clauses stating that "any disputes arising out of or relating to" the provider agreement or "business relationship is to be resolved through arbitration, mediation, or some form of alternative dispute resolution."

Whether an antitrust claim is subject to arbitration is a question of law, and therefore, our standard of review is de novo.[5] Both the federal law, The Federal Arbitration Act codified at 9 U.S.C.A. § 1, et seq., and the state law codified at KRS 417.045, et seq., provide that arbitration is to be favored by the law and "arbitration agreements are enforced

---

[3] Humana Health Plans of Ohio, Inc., was dismissed as a party to the appeal.

[4] Kentucky Revised Statutes.

[5] Conseco Finance Servicing Corp. v. Wilder, Ky. App., 47 S.W.3d 335, 340 (2001).

to the standards applied to other contracts."[6] There has been, however, reluctance by the federal and state courts to compel arbitration of antitrust claims.[7] The Florida appellate court summarized the reasoning of these courts:

> The oft-cited reasons underlying these uniform holdings are (1) because a wide range of public interests are affected by private antitrust claims, a "claim under the antitrust laws is not merely a private matter,"; (2) the complexity of the issues and extensiveness of the evidence generally involved in antitrust litigation make resolution of these claims more appropriate for the judicial forum; (3) it is unwise to allow commercial arbitrators, "frequently men drawn for their business expertise . . . to determine these issues of great public interest,"; and (4) because arbitrators are not bound by rules of law and need not give reasons for their rulings, there is no way to insure consistency of interpretation of statutory law or application of arbitration awards.[8] (Citations omitted.)

Despite the precedent refusing to compel arbitration in antitrust claims, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,[9] the Supreme Court held that there is no prohibition to arbitration in cases involving international transactions. Although not overruling federal cases holding otherwise in domestic cases, the court questioned the reason-

---

[6] Id. at 339.

[7] See e.g., Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116 (7th Cir. 1978); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); American Safety Equipment Corp v. J. P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968).

[8] Sabates v. International Medical Centers Inc., 450 So.2d 514, 517 (1984).

[9] 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

ing of those courts and opened the door for federal courts to hold that such claims can be arbitrated.[10]

There is no Kentucky case specifically addressing whether such claims can be arbitrated. Although we believe there is soundness in the reasoning that public policy considerations favor judicial resolution, we decide this case on the basis that the antitrust claims alleged are simply outside the scope of the arbitration agreements.

A party cannot be required to submit to arbitration unless both parties have agreed that the dispute be arbitrated.[11] Where the alleged injurious conduct does not arise from the employment relationship and is independent from it, the courts will not expand the arbitration agreement merely for the purpose of efficiency.[12] The alleged antitrust violations do not arise from or relate to the service provider contracts. This was the result reached by the Ohio court in a proceeding parallel to the case before us alleging the precise antitrust claims against the same parties under Ohio law. We adopt the reasoning of our sister state:

> Here, the parties' dispute centers on whether the HMOs conspired and/or colluded to set reimbursement rates in this region that were lower than the "prevailing reimbursement rates in other comparable Ohio health care markets such as Dayton, Columbus and Cleveland." In determining whether this claim was within the scope of the arbitration agreements, "[a] proper method of analysis here is to ask [whether this] action could be maintained without reference to the [provider agree-

---

[10] See Nghiem v. NEC Elec., Inc., 25 F.3d 1437 (9th Cir. 1994); Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 757 F.Supp. 283 (S.D.N.Y. 1991).

[11] Oakwood Mobile Homes v. Sprowls, Ky., 82 S.W.3d 193, 195 (2002).

[12] Hill v. Hilliard, Ky. App., 945 S.W.2d 948 (1996).

ment] or [business] relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." (Footnote omitted.)

After reviewing the complaint and the remainder of the record, we conclude that the doctors' antitrust claim could be maintained without reference to their individual provider agreements. To maintain an antitrust claim pursuant to R.C. Chapter 1331, the doctors have to prove that two or more persons came together to illegally concentrate a particular business in the hands of a few for the purpose of controlling prices and that injury resulted from that restraint of trade. (Footnote omitted.) The express elements of an antitrust claim do not depend, as a matter of law, on the provider agreements between the individual doctors and HMOs.

The doctors' allegations in their complaint (1) that the HMOs conspired and/or colluded with one another to illegally lower and fix the reimbursement rates for medical procedures to medical practitioners in the region; (2) that the anticompetitive behavior caused a decline in the number of doctors willing to practice medicine here, which resulted in the number of hospitals and hospital beds available for patient care dropping by nearly 50 percent and a decline in the quality of health care available for the consumer; and (3) that the HMOs' anticompetitive behavior precipitated a drop in physicians' salaries in the area neither relied on nor referred to a contract or a provider agreement between the doctors and the HMOs. Instead, the antitrust claim was based upon a statutory remedy the legislature has provided to persons harmed by illegal price fixing. . . .[13]

The order denying the motion to compel arbitration is affirmed.

---

[13] Academy of Medicine of Cincinnati v. Aetna Health, Inc., 155 Ohio App.3d 310, 312, 800 N.E.2d 1185, 1187 (2003).

ALL CONCUR.

BRIEF FOR APPELLANT ANTHEM HEALTH PLANS OF KENTUCKY, INC.:

Sheryl G. Snyder
FROST BROWN TODD LLC
Louisville, Kentucky

H. Lawson Walker II
James R. Adams
FROST BROWN TODD LLC
Cincinnati, Ohio

BRIEF FOR APPELLANT UNITED HEALTHCARE OF OHIO, INC.:

Stephen J. Butler
Carey A. Greiner
THOMPSON HINE LLP
Cincinnati, Ohio

BRIEF FOR APPELLANT AETNA HEALTH INC.:

Gerald F. Dusing
ADAMS, STEPNER, WOLTERMANN & DUSING, PLLC
Covington, Kentucky

Robert J. Fogarty
HAHN LOESER & PARKS LLP
Cleveland, Ohio

ORAL ARGUMENT FOR APPELLANTS:

Sheryl S. Snyder
Louisville, Kentucky

BRIEF FOR APPELLEES:

Richard S. Wayne
Thomas P. Glass
Joseph J. Braun
STRAUSS & TROY
Cincinnati, Ohio

Michael R. Barrett
BARRETT & WEBER, L.P.A.
Cincinnati, Ohio

Stanley M. Chesley
Terrence L. Goodman
Jean M. Geoppinger
WAITE, SCHNEIDER, BAYLESS & CHESLEY CO., L.P.A.
Cincinnati, Ohio

ORAL ARGUMENT FOR APPELLEES:

Richard S. Wayne
Cincinnati, Ohio

Stanley M. Chesley
Cincinnati, Ohio

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2003-CA-000752-MR

ANTHEM HEALTH PLANS OF KENTUCKY, INC. D/B/A ANTHEM BLUE CROSS AND BLUE SHIELD
Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI, ET AL.
Appellees

APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 02-CI-00903

AND

NO. 2003-CA-00753-MR

UNITED HEALTH CARE OF OHIO, INC.
Appellant

v.

ACADEMY OF MEDICINE OF CINCINNATI, ET AL.
Appellees

APPEAL FROM BOONE CIRCUIT COURT
ACTION NO. 02-CI-00903

* * * * * *

ORDER DENYING PETITION FOR REHEARING

BEFORE: GUIDUGLI, JUDGE; EMBERTON AND MILLER, SENIOR JUDGES.[14]

---

[14] Senior Judge Thomas D. Emberton and Senior Judge John D. Miller sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

Having considered appellants' motion for leave to cite additional authority in the petition for rehearing filed on November 17, 2004, the Court ORDERS the motion be, and it is hereby, GRANTED.

Having considered the petition for rehearing and the response thereto, the Court ORDERS the petition be, and it is hereby, DENIED.

ENTERED: 1-11-05 /s/
JUDGE, COURT OF APPEALS

SUPREME COURT OF KENTUCKY

2005-SC-0109-D
(2003-CA-0752 & 2003-CA-0753)

ANTHEM HEALTH PLANS OF KENTUCKY, INC. and
UNITED HEALTHCARE OF OHIO, INC.
Movants

v.

DR. E. DOUGLAS BALDRIDGE, ET AL.
Respondents

BOONE CIRCUIT COURT
NO. 2002-CI-0903

ORDER DENYING DISCRETIONARY REVIEW

The notice, treated as a motion, of Anthem Health Plans of Kentucky, Inc., to dismiss its motion for discretionary review, is granted to the extent that Anthem Health Plans of Kentucky, Inc., is dismissed as a party to the motion for discretionary review.

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED February 15, 2006.

/s/
Chief Justice

KENTUCKY REVISED STATUTES ANNOTATED
TITLE XXIX. COMMERCE AND TRADE
CHAPTER 367. CONSUMER PROTECTION
CONSUMER PROTECTION ACT

§367.175 Other unlawful acts

(1) Every contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

(2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

(3) The sale, delivery, holding, or offering for sale of any self-testing kits designed to tell persons their status concerning human immunodeficiency virus or acquired immunodeficiency syndrome or related disorders, and any advertising of such kits, shall be prohibited.

(4) In addition to any other penalties, violations of this section shall also be a Class C felony.